

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 12-203
Competition in the Market for the	)	
Delivery of Video Programming	)	

**COMMENTS OF PUBLIC KNOWLEDGE**

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## **Introduction**

The video distribution market is not sufficiently competitive. Traditional MVPDs and broadcasters remain the dominant force in video distribution and the evidence shows they still possess market power.

While they have not yet challenged the overall market position of incumbent providers, online video distributors (OVDs) have made analysis of video competition significantly more complex. Public Knowledge (PK) commends the Commission for taking a sound approach to the analysis of this issue; in particular, that it has declined to take a simple approach labeling online video distributors (OVDs) as either “competitors” or “not competitors” to traditional multichannel video programming distributors (MVPDs). Good policies cannot flow from a binary analysis of this kind. Rather, MVPDs, OVDs, and broadcasters are related entities that interact in complex ways, and have mixed incentives. A nuanced approach best serves the Commission’s goals.

In this environment, the Commission should take several steps to promote the ability of OVDs to compete with MVPDs, and to ameliorate the consumer harms that flow from a lack of sufficient competition. In particular, it should promote the ability of OVDs to access programming, should protect OVDs from discriminatory treatment from video providers, reform its retransmission consent rules, and streamline the program carriage process.

### **I. The Video Market Resists Simple Analysis**

Different MVPDs and different OVDs, while they may offer similar services, have different incentives and different competitive aims. Given this complexity, the

“strategic group” framework is a sound one.<sup>1</sup> While MVPDs still possess market power, online video services are an emerging competitor. They face challenges, however, both in regards to whether they can access the content they need to provide a service that is directly comparable to MVPDs, and whether they will be able to reach viewers in an environment of limited broadband competition. Thus, whether OVDs become full competitors, or remain largely complementary to MVPDs, depends in part on the policy decisions the Commission makes.

For antitrust purposes, the Department of Justice has found that both OVDs and MVPDs are part of the same market for “video programming distribution.” At the same time it recognizes that “[s]ome ... OVD products and services undoubtedly will be viewed by consumers as closer substitutes for MVPD services than others. The extent to which an OVD service has the potential to become a better substitute for MVPD service will depend on a number of factors...”<sup>2</sup>

At the moment, OVDs primarily compete with some of the non-core services offered by MVPDs, such as video-on-demand. They provide niche and independent programming that cannot find a home on MVPDs. For a minority of viewers (a growing minority, but still a minority) they are adequate substitutes for MVPDs. While this is enough to show that OVDs and MVPDs are competitors for some antitrust purposes, the Commission’s analysis cannot stop there. Its goal is to

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<sup>1</sup> Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Notice of Inquiry*, MB Docket No. 12-203 ¶ 8 (rel. July 20, 2012) (“Video NOI”).

<sup>2</sup> Competitive Impact Statement of the Department of Justice, *United States v. Comcast Corp.*, 1:11-cv-00106, (D.C. Cir. Jan. 18, 2011) (“DoJ Analysis”) at 17.

promote competition and the public interest, not simply to enforce the basic requirements of antitrust.

Furthermore, given the dynamic nature of OVDs, any simple analysis is likely to be soon outdated. OVDs are constantly entering and leaving the market, and changing the services and programming they offer, both in response to viewer demand and external factors (such as problems accessing content or reaching consumers).<sup>3</sup> More broadly, “markets” are not exclusive. The same product may compete in multiple markets simultaneously, and it is possible to define markets narrowly or broadly as the situation warrants. While an antitrust action, such as the Comcast/NBCU merger order, may focus on a few particular markets where a harm has been identified, this does not imply that these are the *only* markets relevant for a broader analysis. MVPDs and OVDs may be markets of their own, as well as part of a “video programming distribution” market, and the participants in that market may in turn all be members of a broader video market that includes theaters and DVD rental.

The reasoning of the FTC and the DC District Court in blocking the merger of Office Depot and Staples will serve to illustrate this point.<sup>4</sup> In that case, the relevant product market was “the sale of consumable office supplies through office

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<sup>3</sup> For example, in response to data caps in Canada, Netflix has reduced the quality of its video streams. *See* Netflix Lowers Data Usage By 2/3 For Members In Canada, <http://blog.netflix.com/2011/03/netflix-lowers-data-usage-by-23-for.html>. Also, the content that is available through OVDs changes frequently. *See* Ryan Lawler, *3 Things to Expect from Hulu's New Content Deals*, GigaOm, May 12, 2011, <http://gigaom.com/video/new-hulu-deal>; Sarah Kessler, *Netflix Loses Toy Story 3, Tron and 1,000 More Movies*, MASHABLE, March 1, 2012, <http://mashable.com/2012/03/01/netflix-starz-goodbye>.

<sup>4</sup> *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (Dist. Court DC 1997).

superstores.” Both the FTC and DoJ found that the merger would substantially lessen competition in that market. As the court observed,

The Court acknowledges that there is, in fact, a broad market encompassing the sale of consumable office supplies by all sellers of such supplies, and that those sellers must, at some level, compete with one another. However, the mere fact that a firm may be termed a competitor in the overall market-place does not necessarily require that it be included in the relevant product market for antitrust purposes.<sup>5</sup>

Similarly, while the Department of Justice’s market analysis of the Comcast/NBCUniversal merger is sound, it was geared toward identifying a product market (the “relevant” market) where there was likely to be competitive harm. It is not a comprehensive analysis of the structure of the video market that takes into account all of its nuance, and should not be the end point of the FCC’s analysis of competition between OVDs and MVPDs.

In any event, regardless of how the “market” is defined, it is clear that traditional MVPDs—in particular, cable systems—still possess significant market power. As the Commission has found, cable prices continue to rise faster than inflation.<sup>6</sup> The Commission’s own analysis shows that 25,508 communities have no effective MVPD competition, while only 8,508 do. As an initial matter PK does not agree that the presence of an overbuilder or other providers necessarily means that competition is “effective”—but certainly these communities face *more* competition. The results are as expected: prices in more competitive communities are lower.<sup>7</sup>

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<sup>5</sup> *Id.* at 1075.

<sup>6</sup> Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, Report on Cable Industry Prices, MM Docket No. 92-266 ¶ 2 (rel. Aug. 13, 2012).

<sup>7</sup> *Id.* ¶ 7.

To be sure, many price hikes are attributable to increased programming costs, rather than profit-taking by MVPDs. In particular, broadcasters have been charging MVPDs ever-higher retransmission fees, which are then passed along to consumers. Thus, even those cable markets with overbuilders have seen price hikes.<sup>8</sup> It is certainly more difficult for an MVPD to compete without offering the full range of programming that customers expect. Nevertheless, in a truly competitive video delivery market, one or more competitors might decline to carry certain expensive programming and become a more low-cost alternative. The recent dispute between Viacom and DISH would seem to provide evidence for this—customers may be more willing to forgo certain programming in exchange for lower costs than the popular wisdom suggests.<sup>9</sup> But this consumer preference goes largely unserved.<sup>10</sup>

One factor that complicates the Commission’s analysis is the fact that a single company may control entities in multiple strategic groups.<sup>11</sup> Comcast/NBCUniversal is an MVPD, a broadcaster, and an ISP. Hulu, a major OVD, is controlled by broadcasters. While a “pure” OVD may wish to compete with MVPDs head-on, the motives of an OVD with ties to other entities may be more mixed. Such an OVD may take steps to remain complementary, rather than competitive to, MVPDs. To complicate matters yet further, some entities are both programmers and MVPDs, or

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<sup>8</sup> *Id.* ¶ 3.

<sup>9</sup> See Brian Stelter, *Denied Nickelodeon, DirecTV’s Youngest Clients Find Substitutes*, NY TIMES, July 18, 2012, <http://www.nytimes.com/2012/07/19/business/media/dispute-with-directv-aids-viacoms-rivals-in-childrens-programming.html>.

<sup>10</sup> In some respects, for some viewers, over-the-air TV and OVDs serve as the low-cost alternative that is missing in the MVPD market. But, as discussed above, even this does not mean that MVPDs and OVDs compete in the same market for all purposes.

<sup>11</sup> See Video NOI ¶ 62.

programmers and broadcasters, and may restrict the availability of programming to entities they see as competitive threats. These mixed incentives significantly complicate a traditional market analysis and stymie attempts to view OVDs as part of a single market (or submarket).

Another complicating factor is that MVPD service itself is often offered as part of an overall bundle of services, or as a means to enhance customer “stickiness.”

MVPDs that offer service in this way are not directly comparable to “pure” MVPDS, such as DBS providers. It is well-documented that incumbent cable operators who bundle their MVPD service with phone and broadband service offer many enticements to prevent people from “cutting the cord” and subscribing only to broadband. Under some promotional deals, a cable plus broadband package may cost as much (or less) than a broadband-only package, or be only a few dollars different. To be sure, these enticements are often only short-term and miscellaneous cable fees have a tendency to accumulate. But clearly, as with many bundled services, there is a level of cross-subsidization between different products, with resultant pricing opacity, that makes it difficult to compare competing products.

Relatedly, one positive development in broadband competition is the emergence of a few (for-profit) fiber-to-the-home overbuilders; namely, Sonic.net and Google Fiber. Both of these providers have been primarily billed as superfast broadband providers—yet they have both found it wise to offer MVPD service along with Internet service.<sup>12</sup> In short, customers still demand traditional MVPD service, and it

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<sup>12</sup> See Brian Lawler, *Sonic.net to Stream New Local TV Service*, GIGAOM, Sep. 7, 2011, <http://gigaom.com/video/sonic-streaming-tv>; Samantha Murphy, *Google Fiber TV*



is hard to offer a “naked” broadband connection and hope to achieve mass success. These new entrants, who plan to “compete” in the video delivery market for extraneous reasons, further underline the complex nature of the video delivery market, and the mixed motivations of its members.

## **II. The Commission Should Enhance Video Competition**

### ***A. The Commission Should Allow OVDs to Operate as MVPDs***

The Commission should resolve the questions raised in its recent NOI on the definition of an MVPD and recognize that an MVPD does not need to construct its own last-mile facilities. Doing this will enhance competition in video delivery directly, by enabling companies like Sky Angel to serve their customers, and indirectly, by enhancing the overall availability of content to OVDs (even thoughts that are not MVPDs).<sup>13</sup>

It would obviously enhance MVPD competition if the Commission allowed new entities to operate as MVPDs. Companies that wish to provide the service of multiple channels of video programming should be permitted to do so, without having to satisfy arbitrary technological requirements. To operate as an MVPD, a provider should not have to build last-mile wireline facilities, launch satellites, or engage in other infrastructure projects. The Commission, in short, should promote MVPD competition by promoting competition between MVPDs, instead of adopting an industrial policy to promote new infrastructure investment. In the broadband

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*Coming Soon to a Living Room Near You*, MASHABLE, July 6, 2012, <http://mashable.com/2012/07/26/google-fiber-tv>.

<sup>13</sup> See Comments and Reply Comments of Public Knowledge in Interpretation of the terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding, MB Docket No. 12-83, *available at* <http://www.publicknowledge.org/interpretation-mvpd>.

context it may make sense for the Commission to encourage the development of new delivery facilities, but the MVPD context is not the place to do this.

However, the Commission should also recognize that unleashing online MVPDs would also boost competition in online video generally, even among those providers who do not choose to offer MVPD service. Currently, many large incumbent MVPDs use “most favored nation” (MFN) and other provisions in their contracts to prevent independent programmers from making content available on the Internet, or through other alternate means. While it would be illegal for MVPDs to try to keep programming away from other MVPDs in this way, the Commission’s outdated rules unfortunately do not protect new, non-MVPD distributors from this sort of conduct. As a result, even Apple—the world’s largest publicly-traded company—has been unable to obtain the programming contracts that would allow it to launch an enhanced OVD service<sup>14</sup>—and has even been stymied in its less-ambitious initiative to release a cable set-top box.<sup>15</sup> While the Commission can and should update its rules to take account of this lacuna, it also can take steps to reduce the incentive for incumbent MVPDs to engage in these sorts of practices. If, as discussed above, the Commission allows some providers to operate as MVPDs, the value of exclusivity for content goes down. An incumbent MVPD might be less inclined to prevent a programmer from making its content available online through non-MVPD sources if

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<sup>14</sup> Peter Kafka, *Apple’s iTunes Pitch: TV for \$30 a Month*, All Things D, Nov. 2, 2009, <http://allthingsd.com/20091102/apples-itunes-pitch-tv-for-30-a-month>.

<sup>15</sup> John Paul Titlow, *Big Cable Stalls Apple’s TV Plans*, READWRITEWEB, <http://www.readriteweb.com/archives/big-cable-stalls-apples-tv-plans.php>; John Bergmayer, *Rumors of Apple Set-Top Box a Reminder of Thwarted Innovation*, PUBLIC KNOWLEDGE POLICY BLOG, Aug. 17, 2012, <http://www.publicknowledge.org/blog/rumors-apple-set-top-box-reminder-thwarted-in>.

customers would in any case have the option of getting that content through an online MVPD.

In short, if the Commission allows for online providers to operate as MVPDs, not only will it directly promote online and MVPD competition, it will set in motion a chain reaction that could substantially improve the availability of content online through various sources.

***B. The Commission Should Acknowledge That Threats to Internet Openness, Such as Discriminatory Data Caps, Threaten OVDs***

The Commission has asked about what inputs are necessary to providing online video service. It rightly observed that programming and customer-premises equipment are such inputs.<sup>16</sup> The Commission should also analyze last-mile broadband facilities as a key input to providing online video service.

An online video provider cannot reach its viewers without having its traffic travel over various networks. But the only network that a online provider *must* use is the last-mile consumer broadband network. Broadband customers pay last-mile ISPs for Internet access and expect to be able to access online services, including online video delivery services. But, since many broadband ISPs also compete in the video delivery business, they have a built-in incentive to discriminate against their online competitors (or potential competitors). They may do this through discriminatory traffic management practices, through outright degradation of competing traffic, or through unfair billing methods (for example, by putting in place data caps that are designed to discourage high-bandwidth applications, rather

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<sup>16</sup> See Video NOI ¶¶ 79, 80.

than to manage network congestion at peak usage times, or by exempting their own video services from caps).

The Commission, of course, has dealt with some of these issues through its Open Internet rules, which are designed to protect the rights of broadband consumers to access the online services of their choice, and to ensure that edge services are able to reach their customers. It should continue to enforce those rules and related policies—for instance, by acting expeditiously to resolve the complaint PK filed, arguing that Comcast’s exemption of its own broadband video services from its data caps violates the Internet openness conditions on its merger with NBCUniversal.<sup>17</sup>

However, given the particular incentive that some broadband ISPs have to discriminate against online video providers, the Commission must also consider these issues in the context of video competition. The Commission cannot fully understand the challenges online video distributors face, or the market they operate in, without taking into account that one of their key inputs is controlled by a “supplier” that may have an incentive to withhold it.<sup>18</sup>

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<sup>17</sup> Public Knowledge, Petition to Enforce Merger Conditions, Aug. 1, 2012, <http://www.publicknowledge.org/files/Comcast-Xbox%20FINAL.pdf>.

<sup>18</sup> It is worth observing that an ISP that is also an MVPD would be prohibited from taking discriminatory actions against an online MVPD under Section 628 of the Communications Act, 47 U.S.C. § 548, in addition to such actions violating Internet openness rules.

***C. The Commission Should Take Other Steps to Help OVDs Compete With MVPDs***

**1. The Commission Should Adopt Rules That Allow for Innovative Video Devices**

MVPD set-top boxes that are controlled by MVPDs are unlikely to ever make OVD services available that MVPDs perceive as a competitive threat. Consequently, OVDs, to reach the living room, must depend on consumers either connecting their computers to their television sets or purchasing extra devices.

The Commission is already charged by Congress to promote competition in video devices (that is, devices that can access MVPD content).<sup>19</sup> Even without considering the effect on OVDs this is a worthy aim: video device competition would drive innovation and keep prices disciplined.

However, in this docket, the Commission cannot ignore the consequences of a stunted video device market on OVDs. Robust video device competition would bring varied devices to market, including smart TVs and other devices that can seamlessly mix MVPD and OVD content. This, in turn, would make it easier for viewers to use OVDs, which would enhance competition throughout the video delivery market. The best solution to promote video device competition remains AllVid, and the Commission should implement it soon.

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<sup>19</sup> 47 U.S.C. § 549.

## 2. The Commission Should Promote Broadband Competition, Which Would Protect OVDs and Consumers Alike

The Commission has recently approved a deal that signals the abandonment of the policy of intermodal, facilities-based wireline broadband competition.<sup>20</sup> This was a mistake. Competition between broadband providers remains vital to protect consumers—it gives them the option to vote with their wallets and choose to subscribe to the broadband providers with the best service, the most open networks, and the fastest speeds. Competition between providers also promotes network upgrades and new buildout, and encourages new buildout by making each customer more valuable. OVDs depend on broadband, and as the Department of Justice has noted, “the competitive significance of OVDs is fostered by protecting broadband providers’ economic incentives to upgrade and improve their broadband infrastructure, and obtain fair returns on that investment.”<sup>21</sup>

The Commission must therefore revitalize its efforts to promote wireline-based broadband competition. (Wireless broadband, while valuable, is not an adequate medium for online video.<sup>22</sup>) This revitalization could take several forms. A genuine effort to make intermodal competition work, open-access networks and line-sharing, and community-owned networks may all have their place. Because the Commission cannot hope for OVDs to become full competitors unless there is adequate

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<sup>20</sup> Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent To Assign AWS-1 Licenses, Memorandum Opinion and Order and Declaratory Ruling, WT Docket No. 12-4, (rel. Aug. 23, 2012), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2012/db0823/FCC-12-95A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0823/FCC-12-95A1.pdf).

<sup>21</sup> DoJ Analysis 17-18.

<sup>22</sup> Steven Crowley, *The Challenge of HD Video Streaming on LTE*, April 11, 2011, <http://stevencrowley.com/2011/04/22/streaming-hd-video-on-mobile-broadband/#more-1977>.

broadband competition, it should consider this issue in its analysis of video distribution competition as well.

### 3. The Commission Should Not Overlook Policies that Enhance Competition Among Traditional MVPDs

While these comments have focused on ways the Commission can promote competition from OVDs, it should not overlook measures that would enhance the ability of competitive smaller MVPDs to compete. For example, as PK has long argued, the Commission should update its retransmission consent rules, not only as a way to protect viewers from high prices, but to promote the ability of small cable systems, DBS, and cable overbuilders to offer competitive service. And in addition to making sure the program access system makes sense for the online age, it should make sure it works better for its existing purpose of allowing all MVPDs to access the content they need.

Finally, until the video programming delivery market is sufficiently competitive, the Commission should not overlook those policies that are designed to ameliorate this lack of competition—not only should the Commission continue to ensure that basic MVPD service is available at affordable rates, and that low-income viewers are not priced out of the market, but it should more expeditiously enforce its program carriage policies that ensure that diverse programming is able to make it through the MVPD bottleneck.

## **CONCLUSION**

The video programming delivery market is not sufficiently competitive. To remedy this, among other things, the Commission should take steps to ensure that

new online competitors have access to the programming they need and that they can continue to reach viewers in an environment of limited broadband competition.

Respectfully submitted,

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